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E-filed: July 2, 2008

Attorneys for Creditor,
Dolores Leserra

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:) Case No.: 07-16645-lbr
CHONG, LISA MARIE,) Chapter 7
Debtor.) Date of Hearing: August 5, 2008
) Time of Hearing: 9:30 a.m.

MOTION FOR RELIEF FROM THE DISCHARGE INJUNCTION TO ALLOW CREDITOR TO PROCEED AGAINST DEBTOR'S INSURANCE PROCEEDS

16 Creditor, DOLORES LESERRA (“Leserra”) through her attorneys, MATTHEW L.
17 JOHNSON, MELISSA A. VERMILLION, and RUSSELL G. GUBLER, of the law firm of
18 MATTHEW L. JOHNSON & ASSOCIATES, P.C., respectfully moves this Honorable Court,
19 pursuant to 11 U.S.C. § 524(a) & (e), for relief from the discharge injunction, to the extent that
20 there is an injunction against the Debtor’s insurance company, to allow the Eighth Judicial
21 District Court case in *DOLORES LESERRA, vs. SA CHONG*, case no. A522211, to proceed
22 against Debtor, to allow Leserra to collect from the Debtor’s insurance provider the value of the
23 claim for any causes of action arising out of the automobile accident that occurred on or about
24 January 8, 2005, between Leserra and the Debtor. Leserra warrants that any judgment awarded,
25 including excess judgment, shall be collected from the Debtor’s insurer only, and not against
26 the Debtor personally. Leserra warrants that she will not collect any judgment awarded,
27 including excess judgment, from the Debtor, individually, but shall seek any judgment from the
28 Debtor’s insurer.

This Motion is based on the points and authorities set forth herein, the pleadings and papers on file in this matter, and any evidence and argument presented at the time of hearing in support of the Motion.

DATED this 2nd day of July, 2008.

~~MATTHEW L. JOHNSON & ASSOCIATES, P.C.~~

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POINTS AND AUTHORITIES

I. FACTS

On or about January 8, 2005, Leserra was driving westbound on St. Louis, in Clark County, Nevada. Debtor was traveling southbound on Maryland Parkway in Clark County, Nevada. Debtor traveled against a red light at the intersection of Maryland Parkway and St. Louis and collided with Leserra. The front of Debtor's vehicle struck the rear of Plaintiff's vehicle. Because of the collision, Leserra has suffered serious bodily injury and damages in excess of \$500,000.

On or about May 23, 2006, Leserra filed a complaint concerning the collision and named Debtor as the defendant. To settle the matter, Leserra demanded the policy limits from Debtor's automobile insurance company. However, Debtor's insurance carrier rejected the demand in bad faith. Upon information and belief, Debtor's insurance counsel advised Debtor to file bankruptcy. Thereafter, on or about October 15, 2007, Debtor filed a Chapter 7 Voluntary Petition, and the state court action against Debtor was stayed.

1 Because the action was stayed, Leserra still has a personal injury claim against the
 2 Debtor stemming from a motor vehicle accident on January 8, 2005. Before Leserra could
 3 settle or otherwise pursue any claim with Debtor's insurance company, Debtor filed her
 4 bankruptcy petition. As a result, Leserra has mounting medical expenses stemming from an
 5 accident that was not her fault.

6 Leserra now requests that this Honorable Court grant her relief from the discharge
 7 injunction to allow the District Court case to proceed, and so that Leserra's claim may be
 8 determined. Leserra will not attempt to collect against Debtor personally, but will seek to
 9 enforce any judgment against the debtor's automobile insurance company.

10 **II. ARGUMENT**

11 **A. *Leserra requests that this Honorable Court reopen the Debtor's***
 12 ***bankruptcy proceeding.***

13 The decision to reopen a bankruptcy case lies within the discretion of the bankruptcy
 14 court. *In the Matter of Gladys E. Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991); *Hawkins v.*
 15 *Landmark Finance Co.*, 727 F.2d 324, 326 (4th Cir. 1984); *In re Patterson*, 297 B.R. 110, 114
 16 (Bankr.E.D.Tenn. 2003). In general, because a bankruptcy court does not have power to
 17 discharge the liabilities of a nondebtor (see *Underhill v. Royal*, 769 F.2d 1426, 1431-32 (9th
 18 Cir. 1985)), a discharge injunction does not prevent a creditor from suing a debtor on a
 19 nondischargeable debt, or from naming the debtor as a nominal defendant in a suit to recover a
 20 dischargeable debt so long as the judgment will not be enforced against the debtor. *In the*
 21 *Matter of Gladys E. Shondel*, 950 F.2d 1301, 1306 (7th Cir. 1991); *In re Jones*, 348 B.R. 715,
 22 719 (Bankr.E.D.Va. 2006). Similarly, a creditor does not violate the discharge injunction by
 23 proceeding with a postdischarge suit against a debtor to determine the liability to collect from
 24 a third party, such as an insurance carrier. *In re Patterson*, 297 B.R. 110, 113
 25 (Bankr.E.D.Tenn. 2003). However, bankruptcy courts have noted:
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1 [A] creditor who proceeds outside the bankruptcy court without first
 2 seeking a determination of dischargeability or relief from the discharge
 3 injunction runs the risk of being held in contempt for violating of the
 discharge injunction if the debt is determined to be dischargeable.

4 *In re Jones*, 348 B.R. at 719; *Cherry v. Arendall (In re Cherry)*, 247 B.R. 176
 5 (Bankr.E.D.Va.2000). Therefore, parties have been “well advised in doubtful cases to seek
 6 relief from the discharge injunction in the bankruptcy court prior to commencing suit in another
 7 forum.” *In re Jones*, 348 B.R. at 719.

8 A bankruptcy court has authority to modify a discharge injunction to allow a creditor to
 9 proceed with a tort action solely to recover from the debtor’s insurer. *In the Matter of Gladys E.*
 10 *Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991). “Such modifications are frequently made in
 11 order to effectuate provisions of the Bankruptcy Code, such as section 524(e)’s exemption of
 12 ‘any other entity’ which may be liable on the debtor’s behalf from the statutory injunction.” *In*
 13 *the Matter of Gladys E. Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991); *see e.g., Jet Florida*, 883
 14 F.2d at 973; *In re McGraw*, 18 B.R. 140 (Bankr.W.D.Wis. 1982).

15 For purposes of collecting on a discharged prepetition debt from a debtor’s insurer, a
 16 creditor does not need to proceed with a postdischarge lawsuit to determine liability as a
 17 prerequisite to filing a motion to reopen a debtor’s closed Chapter 7 bankruptcy case to obtain
 18 relief from a discharge injunction. *In re Patterson*, 297 B.R. 110, 114 (Bankr.E.D.Tenn. 2003).

19 In the matter at hand, Leserra was pursuing her personal injury claim in state court
 20 against the Debtor. During the lawsuit against Debtor, Leserra attempted to settle the claim
 21 within the Debtor’s insurance policy limits. However, Debtor’s insurance provider refused.
 22 Thereafter, Debtor’s insurance defense counsel suggested that Debtor file bankruptcy instead of
 23 fighting the claim. Debtor subsequently filed bankruptcy, and Debtor’s bankruptcy petition was
 24 granted. Debtor received a discharge on or about January 15, 2008.

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1 Leserra desires to pursue her claim in state court. However, to ensure that Leserra does
 2 not violate the discharge injunction against the Debtor, Leserra requests that this Honorable
 3 Court use its authority to reopen the Debtor's bankruptcy proceeding to grant an order of relief
 4 from the discharge injunction, to the extent that there is an injunction against the Debtor's
 5 automobile insurance company. As is often the case, such an order would effectuate provisions
 6 of the Bankruptcy Code, such as section 524(e)'s exemption of "any other entity", which may
 7 be liable on the debtor's behalf from the statutory injunction. Such an "other entity" would be
 8 Debtor's automobile insurance provider.

9

10 ***B. To the extent that there is an injunction against the Debtor's
 11 insurance company, Leserra requests that this Honorable Court
 12 modify the injunction to allow Leserra to pursue her claims in state
 13 court and to collect from the Debtor's insurance provider the value
 14 of Leserra's claims.***

15 Leserra may pursue her claim in state court, without holding the Debtor personally
 16 liable. Section 524(a) of the Bankruptcy Code states:

17 A discharge in a case under this title . . . operates as an injunction
 18 against the commencement or continuation of an action, the
 19 employment of process, or an act, to collect, recover or offset any
 20 such debt *as a personal liability of the debtor*, whether or not
 21 discharge of such debt is waived.

22 11 U.S.C. § 524(a)(2) (emphasis added). Similarly, section 524(e) states, that the "discharge of
 23 a debt of the debtor *does not affect the liability of any other entity on, or the property of any*
 24 *other entity for, such debt.*" 11 U.S.C. § 524(e) (emphasis added). Therefore, a "discharge in
 25 bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal
 26 liability for the debt. Section 524(e) specifies that the debt still exists and can be collected from
 27 any other entity that might be liable." *In re Edgeworth*, 993 F.2d 51, 53 (5th Cir. 1993).

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1 Leserra may pursue the Debtor in name to obtain a judgment against Debtor's insurance
 2 provider. When the costs of defense are paid by the insurer and there is no execution of
 3 judgment against the debtor personally, the Code does not bar suit against a discharged debtor
 4 as nominal defendant, even if insurer denies coverage. *In re Edgeworth*, 993 F.2d 51, 54 (5th
 5 Cir. 1993); *see also In re Jet Florida Sys., Inc.*, 883 F.2d 970, 976 (11th Cir. 1989); *In the*
 6 *Matter of Gladys E. Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991). Therefore, a creditor may
 7 proceed with an post-discharge action against a debtor, in name only, in order to establish the
 8 liability and possibly collect from an insurance carrier. *In re Patterson*, 297 B.R. 110, 113
 9 (Bankr.E.D.Tenn. 2003). If an insurer is unwilling to defend its insured, the debtor may simply
 10 default, knowing that judgment will be unenforceable except against the insurer. *In re*
 11 *Edgeworth*, 993 F.2d 51, 54 (5th Cir. 1993).

13 The Debtor's insurance provider may still be liable because the Code only protects *the*
 14 *Debtor* from personal liability. At the time of the accident between Leserra and the Debtor, the
 15 Debtor carried insurance. Although the Debtor was discharged from liability, Leserra still has
 16 uncompensated medical bills from the accident. By granting an order of relief that would allow
 17 Leserra to pursue her claims in state court, Debtor will not be affected, and Leserra will still be
 18 able to seek compensation under her claim. Even if Debtor is nominally named, Leserra would
 19 not hold the debtor personally liable. Instead, Leserra would only pursue a judgment for the
 20 value of her claim against the Debtor's automobile insurance carrier. As expressed above, such
 21 grants of relief are generally granted against an insurance carrier because the relief will not
 22 affect the Debtor or the property of the Estate. Therefore, Leserra requests that this Honorable
 23 Court, to the extent that there is an injunction against the Debtor's automobile insurance
 24 company, grant relief from the discharge injunction in this matter, as provided in the Code.
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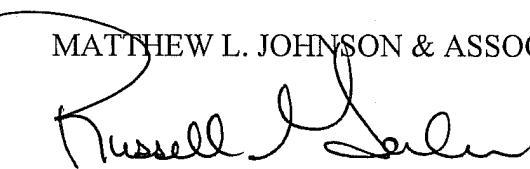
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(702) 471-00751 **III. CONCLUSION**

2 The Court has discretion to reopen a bankruptcy case to grant relief from the discharge
 3 injunction. Such actions by a bankruptcy court are common to allow one who holds a claim in
 4 state court to proceed against the Debtor's insurance carrier. To the extent that there is an
 5 injunction against the Debtor's insurance company, Leserra requests that this Honorable Court
 6 grant relief from the discharge injunction to allow Leserra to pursue the Eighth Judicial District
 7 Court case in *DOLORES LESERRA, vs. SA CHONG*, case no. A52221, and to allow Leserra to
 8 collect from the Debtor's insurance provider the value of the claim for any causes of action
 9 arising out of the automobile accident that occurred on or about January 8, 2005, between
 10 Leserra and the Debtor.

11 Leserra warrants that she will not attempt to collect against the Debtor individually, but
 12 will seek proceeds from Debtor's automobile insurance carrier. For these reasons, relief from
 13 the discharge injunction should be granted.

14 DATED this 2nd day of July, 2008.

15 MATTHEW L. JOHNSON & ASSOCIATES, P.C.



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CERTIFICATE OF SERVICE

I hear by certify that on this 7 day of July, 2008, I sent a true and correct copy of the foregoing MOTION FOR RELIEF FROM THE DISCHARGE INJUNCTION TO ALLOW CREDITOR TO PROCEED AGAINST DEBTOR'S INSURANCE PROCEEDS via electronic service to the following:

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~~An employee of Matthew L. Johnson & Associates, P.C.~~

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